No. 79-886

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE UPJOHN COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects against the compelled disclosure of communications between an attorney—serving as a corporation's general counsel, and as an officer and director—and the corporation's employees, only when such employees play a substantial role in directing the corporation's response to the legal advice sought.

2. Whether the work product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947), protects against compelled disclosure of documentary evidence sought by an internal revenue summons where the Internal Revenue Service shows necessity for production of such evidence.

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[1] In addition to The Upjohn Company, petitioners include Gerard Thomas, Vice-President and Secretary of The Upjohn Company. In addition to the United States, respondents include David E. Nowak, Special Agent, Internal Revenue Service.

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OPINIONS BELOW

The opinion of the United States Magistrate (Pet. App. 9a–37a; J.A. 171a–209a), which was adopted by the district court (Pet. App. 39a–40a; J.A. 210a–211a), is not officially reported. The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 600 F.2d 1223.

JURISDICTION

The judgment of the court of appeals was issued on June 28, 1979 (Pet. App. 45a–46a). On September 10, 1979, the court of appeals denied a petition for rehearing, with suggestion for rehearing en banc (Pet. App. 43a). The petition for a writ of certiorari was filed on December 7, 1979, and was granted on March 17, 1980 (J.A. 214a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner The Upjohn Company is a multinational corporation engaged in the manufacture and marketing of pharmaceuticals. It conducts its business in approximately 150 foreign countries, through both foreign subsidiaries and foreign branches of United States subsidiaries. Upjohn files a consolidated federal income tax return with some of its subsidiaries, but some of its foreign subsidiaries or affiliates are not included in the return. Petitioner Gerard Thomas is a vice-president, secretary, and general counsel of Upjohn. He is also a member of its board of directors and serves as an officer of some of Upjohn's subsidiaries (Pet. App. 12a; J.A. 91a, 101a, 174a). Despite his legal training, Thomas does not necessarily engage in his functions as a lawyer when he serves the Company in his capacities as an officer or director (J.A. 100a).

In January 1976, Upjohn's independent accountants conducted an audit of one of the Company's foreign subsidiaries. During the audit, the accountants discovered that since January 1, 1971, the subsidiary had made payments to foreign government employees, or to third parties believed to be acting as intermediaries for foreign government employees. Such payments, which exceeded

$4 million from 1971 through 1975, were made for the purpose of securing government business. The fact of these payments was known by certain of Upjohn's inside directors and officers associated with the international operations (Pet. App. 12a; J.A. 174a–175a).

In January 1976, the auditors reported the questionable payments to petitioner Thomas and other individuals in the Company (J.A. 89a). Thomas consulted R.T. Parfet, Jr., the chairman of the board, and outside counsel (J.A. 91a). In a letter dated January 16, 1976, Parfet advised Upjohn's employees that he had "asked Gerard Thomas to investigate certain matters of particular concern to Corporate Management and to the Board of Directors." In his capacity as chairman of the board and chief executive officer, Parfet stated to the employees that he felt that "the subject must be thoroughly reviewed and [had] charged Gerard Thomas with that responsibility" (J.A. 39a). He further warned that "It is imperative that you be completely candid and cooperate fully in responding to questions and requests for information" (J.A. 39a; see also *id.* at 28a).

Thomas thereafter conducted a factual investigation to determine the nature and extent of the questionable payments. The internal investigation was prompted, in part, by Upjohn's concern that it had not properly reported the payments to the Securities and Exchange Commission. As a part of the investigation, Thomas and outside counsel prepared a written questionnaire to be mailed by R.T. Parfet, Jr., the chairman of the board, to 53 foreign general and area managers of the Company. The questionnaire sought information regarding questionable payments and directed the addressee to return the form to Thomas (Pet. App. 13a; J.A. 40a–43a, 175a).

In a letter dated March 8, 1976, accompanying the questionnaires, Parfet stated to the Company employees that he had decided that "it is imperative that the management of this company [have] full knowledge of any [improper] payments * * * made by The Upjohn Company or any of its subsidiaries" (J.A. 40a). He encouraged Upjohn's employees "to discuss these questions with anyone in your subsidiary who you believe would be able to provide useful information" (J.A. 42a). If the employee had any questions, Parfet advised that he "should feel free to communi-

cate directly with your management and with Gerard Thomas who has general responsibility for this investigation" (J.A. 43a). With respect to the information transmitted by the employees, Parfet imposed a limited standard of confidentiality. In his letter of March 8, he stated as follows (*ibid.*):

> This investigation and the information which it develops should be treated as highly confidential and not discussed with any persons other than those Upjohn employees who might be of assistance to you in providing the information requested. This matter should not be discussed with anyone not employed by the Company except our regularly retained public accounting firms and such persons as are specifically designated by Mr. Thomas.

In requesting Upjohn's employees to cooperate with the inquiry, Parfet assumed a sympathetic posture as to their personal responsibilities for making such payments. He acknowledged that Upjohn's employees might not have been aware of the impropriety of their past practices and that they might have made questionable payments under the best of intentions because "they believed [that they] were in the best interests of The Upjohn Company" (*ibid.*). However, in order to eliminate any "uncertainty in the future as to the policy with respect to the practices which are the subject of [the] investigation," Parfet announced that he had "issued a detailed 'Statement of Policy on Political Contributions, Payments to Government Personnel and Proper Accounting Practices.'" He thereupon put the employees on notice that it would be their "continuing responsibility to insure that all Upjohn employees under [their] supervision are aware of and comply with the rules set forth in this Statement" (J.A. 43a).

Thomas interviewed all persons to whom a questionnaire had been sent, and he and two outside counsel also interviewed other persons who had not been mailed questionnaires. A total of 86 persons were interviewed, some of whom were no longer employees of the Company. The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Thomas and outside counsel (Pet. App. 13a–14a; J.A. 92a–93a, 175a–176a). The responses to the questionnaires indicated that Upjohn em-

ployees had made questionable payments to foreign government employees (J.A. 112a). Upjohn was concerned that these payments might have caused violations of the securities and tax laws, as well as foreign currency controls, and that these violations could expose the Company to shareholder suits (J.A. 123a–124a).

On March 26, 1976, following the initial investigation of the questionable payments, Upjohn filed a preliminary report (J.A. 161a–166a) with the SEC on its Form 8–K, voluntarily disclosing detailed information with respect to some, but not all, of the questionable payments. The report disclosed data with respect to payments since January 1, 1971, totaling $2,710,000 in 22 of the 136 countries served by the Company. The report also stated that the investigation was still in progress and that further information would be furnished when the investigation was concluded. However, Upjohn did not submit to the SEC any of the interview notes or questionnaires containing the information upon which the reports were based (J.A. 96a). Upjohn also agreed to furnish the SEC with any additional data it might request with respect to the questionable payments (Pet. App. 14a; J.A. 120a, 176a). At the time the report was filed, Thomas was aware that other companies were making similar disclosures and that the SEC had indicated a policy of more lenient treatment of corporations which voluntarily disclosed such questionable payments. Upjohn made these voluntary disclosures in the hope of obtaining lenient treatment by the SEC (Pet. App. 2a, 14a; J.A. 176a). With the exception of the three or four senior executive officers of the Company, Thomas did not advise any of the Upjohn employees who answered the questionnaires or who were interviewed, of the Company's disclosure to the SEC[2] (J.A. 118a).

Upjohn also made the reports available to the Internal Revenue Service, which then commenced its own investigation of the matter to determine the federal income tax consequences of the payments (Pet. App. 2a; J.A. 157a).

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[2] On July 26, 1976, the Company filed with the SEC an amendment to its Form 8–K, in which it reported that it had received oral or written responses to all questionnaires, that it had conducted additional interviews, and that the total of the questionable payments exceeded $4 million (Pet. App. 14a; J.A. 167a–170a, 176a).

Prior to Upjohn's filing of the Form 8-K report with the SEC in March 1976, the Internal Revenue Service was about to complete an audit of Upjohn's 1972 and 1973 consolidated federal income tax returns. However, because of Upjohn's disclosures on its Form 8-K, the Service did not close the audit. Instead, the revenue agents referred the case to the Internal Revenue Service's Intelligence Division, which thereupon undertook a joint investigation with revenue agents for the period 1972-1974 (Pet. App. 14a-15a; J.A. 177a).

Upjohn furnished two schedules to the Internal Revenue Service regarding the questionable payments.[3] One schedule is entitled "Summary of Company Payments by Year (Companies Listed Are Those Companies with U.S. Tax Implications Only)." The schedule purported to list all questionable payments made from 1971 to early 1976, disclosing the date, the amount, the company making the payments, and the country in which the payment was made. On this schedule Upjohn listed only those payments that it believed had an effect on its consolidated federal income tax returns. The payments as to which Upjohn made such detailed disclosures to the Service totalled approximately $700,000 (Pet. App. 15a; J.A. 69a-70a, 177a).

The second schedule is less detailed and purported to be a country-by-country summary of payments made in connection with Upjohn's foreign operations. Upjohn claimed that these payments, which totalled approximately $3,700,000, did not affect its consolidated federal income tax liability. Upjohn also furnished the Internal Revenue Service with source documentation underlying the schedules, such as cancelled checks, vouchers, invoices, advices, etc. (Pet. App. 15a; J.A. 70a-71a, 177a).

Upjohn permitted the Internal Revenue Service to interview Company employees involved in making questionable payments, and has agreed to transport some foreign employees in countries not accessible to revenue agents to nearby neutral countries. Upjohn, however, refused to permit its employees to answer questions about transactions that, in its judgment, did not affect its con-

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[3] These schedules were never put in evidence, but were examined by the magistrate *in camera* (Pet. App. 15a n.2; J.A. 177a n.2).

solidated federal income tax returns (Pet. App. 16a; J.A. 121a, 178a).

Upjohn's limited disclosure with respect to $3.7 million of the improper payments was inadequate to permit an independent evaluation of their tax consequences. The Internal Revenue Service accordingly sought production from petitioner Gerard Thomas of the documents generated in the course of the internal investigation. Those documents were in part responses by 53 of the Company's foreign general and area managers to written questionnaires prepared by Thomas. In addition, the documents consisted of written notes made by Thomas and two outside counsel of telephone or personal interviews of all corporate employees to whom the foreign payment questionnaire had been sent, as well as 33 other employees who had not received a questionnaire (Pet. App. 2a, 13a; J.A. 175a).

Upon Upjohn's refusal to make available the corporate documents generated in its internal investigation of the improper foreign payments, Special Agent David E. Nowak of the Internal Revenue Service issued a summons to Upjohn and Gerard Thomas to appear and testify concerning Upjohn's tax liability for 1972–1974. The summons was issued pursuant to the Service's statutory authority under 26 U.S.C. 7602. It directed petitioners to produce (Pet. App. 9a, 11a; J.A. 17a–18a, 171a, 173a): "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments * * * by the * * * Company or any of its affiliates * * * to determine whether any funds of the * * * Company had been improperly accounted for on the corporate books" including "but not limited to written questionnaires sent to managers of the * * * Company's foreign affiliates, and memorandums or notes of the interviews conducted * * * with officers and employees of the * * * Company."

2. *The district court's decision.* Petitioners refused to produce the records sought by the summons on the grounds that they were protected by the attorney-client privilege and the work product doctrine. Pursuant to 26 U.S.C. 7402(b) and 7604(a), the United States and Special Agent Nowak commenced this proceeding to enforce the summons in the United States District Court for the

Western District of Michigan. In an affidavit filed with the district court, Special Agent Nowak swore that the testimony and records sought by the summons were not already in the possession of the Internal Revenue Service and that such evidence was necessary for the determination of the federal tax liabilities of Upjohn and its subsidiaries for 1972–1974 (J.A. 13a, 21a).

The case was referred to a magistrate who, after holding a hearing, concluded that the attorney-client privilege protects only communications from those Upjohn employees who were part of the Company's control group and thereby played a substantial role in directing the corporation's response to the legal advice sought. In so holding, the magistrate observed that "In view of the overwhelming acceptance of the control group test, I have concluded that it should be followed in this case" (Pet. App. 22a; J.A. 184a; footnote omitted).[4]

The magistrate further ruled that Upjohn had waived the attorney-client privilege by its disclosures to the SEC of the questionable payments in its 8–K report of March 26, 1976, and its amended 8–K report of July 26, 1976, its agreement to furnish the SEC with any additional data it might request with respect to such payments, and

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[4]The magistrate explained (Pet. App. 22a–23a; J.A. 184a–185a):

> It is apparent from the record that the matter as to which the interviewees made the disclosures to Mr. Thomas was a matter of overwhelming importance to the Company but not one as to which any of the interviewees would be given any substantial role. When Mr. Thomas first heard of the questionable payments, he went first to the Chairman of the Board to discuss the matter. The questionnaire that was sent to the employees went out over the signature of the Chairman of the Board. Mr. Thomas' concern was with the SEC ramifications, the tax consequences, currency regulations, and the like.(Tr. 79–80). These are matters on the highest corporate level and hardly within the domain or authority of the persons interviewed. Clearly, these persons in completing the questionnaires and submitting to interviews were simply giving information to Mr. Thomas to enable him to advise the Board of Directors and its Chairman as to how to handle the securities, tax, and related problems which the questionable payments created. Only the latter had the authority to act in these areas. Thus the disclosures made by the interviewees to Mr. Thomas or the Company's outside counsel do not fall within the attorney-client privilege.

its transmission of the SEC reports and related data to the Internal Revenue Service. As the magistrate observed, "Having disclosed some data with respect to questionable payments, it now seeks to hold back other data relating to the same matter. Under the circumstances, the Company should be deemed to have waived the attorney-client privilege with respect to the same matter, if indeed it ever existed" (Pet. App. 24a; J.A. 186a–187a).

The magistrate also rejected petitioners' claim that the summoned material was protected from disclosure by the work product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). After noting "at the outset * * * [that there is] a serious question as to whether the work product doctrine is even applicable in a summons enforcement proceeding" (Pet. App. 26a; J.A. 188a), the magistrate concluded that the government had made a showing of "substantial need" and an inability "without undue hardship" to obtain the information by other means. See Fed. R. Civ. P. 26(b). In support of this conclusion, the magistrate noted that Upjohn "has relegated to itself the determination of what is or is not relevant to the investigation of the Revenue Service" (Pet. App. 28a; J.A. 190a).[5]

Finally, the magistrate found that the necessity for compelling disclosure in this case is also indicated by the fact that the persons interviewed reside in foreign countries beyond the jurisdiction of the court and thus are not subject to compulsory process (Pet. App. 28a; J.A. 191a). Although Upjohn has said that it will make its employees available for interviews, it has not agreed to bring them to the United States for this purpose (J.A. 120a–121a). But even if such employees were made available for interviews, the magistrate noted that it was "not unreasonable to expect some hesitancy, if not actual hostility, in answering questions with respect to payments which might

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[5] In the magistrate's view, Upjohn's self-serving and uncorroborated assertion of relevance could not stand against Special Agent Nowak's testimony that "instead of accepting the summary of the Company's investigation at face value, he wishe[d] to obtain additional information, such as verification of the recipients of the payments, and to check whether there may have been payments which were not recorded on the Company's books" (Pet. App. 28a; J.A. 190a–191a; see also J.A. 56a–57a, 71a–72a).

have been made in violation of local laws" (Pet. App. 29a; J.A. 191a). The magistrate also observed that "where interviews have in fact been permitted, the scope of the inquiry has been limited to what the Company's counsel deemed appropriate" (*ibid.*; see also J.A. 79a–81a).

In light of the foregoing, the magistrate found that "the record establishes ample necessity for compelling disclosure of the summoned material in this case, and that the work product doctrine does not shield the material from such disclosure" (Pet. App. 30a; J.A. 192a). He therefore recommended that the summons be enforced (Pet. App. 37a; J.A. 199a). The district court adopted the magistrate's recommendation and ordered the summons enforced (Pet. App. 39a–40a, 41a–42a; J.A. 210a–211a, 212a).

3. *The court of appeals' decision.* a. The court of appeals affirmed in part, reversed in part, and remanded the case to the district court for further findings of fact (Pet. App. 1a–8a). It agreed with the district court that the scope of the attorney-client privilege in the context of communications between in-house counsel and corporate employees was limited to the "control group" of the corporation, *viz.*, those senior officers who play a substantial role in directing the corporation's response to the legal advice given. In so holding, it rejected petitioners' claim that the applicability of the privilege should be governed by the "subject matter" test. Pursuant to that test, if the corporation's employee possesses information acquired in the ordinary course of business relating to the subject matter of his employment and the information is communicated confidentially to corporate counsel to assist him in giving legal advice to the corporation, then the communication is privileged (Pet. App. 4a–7a). In the court of appeals' view, the "subject matter" test urged by petitioners would "encourage corporate managers to shield themselves from information about possibly illegal transactions" (*id.* at 5a–6a) and create a "broad 'zone of silence'" (*id.* at 7a).

However, because the record indicated that some of the communications sought by the summons were made by senior corporate officers who were in all likelihood members of the "control group," the court of appeals remanded the case to the district court for further findings and to deny enforcement of the summons with respect to these "control group" communications (Pet. App. 7a).

b. The court of appeals also rejected petitioners' claim that the documents sought by the summons were protected by the work product doctrine. It left undisturbed the district court's finding (Pet. App. 30a; J.A. 192a) that "the record establishes ample necessity for compelling disclosure of the summoned material in this case, and that the work product doctrine does not shield the material from such disclosure." However, the court of appeals also expressed the view that "[t]he work-product doctrine of *Hickman* v. *Taylor* * * * [329 U.S. 495 (1947)] and Fed. R. Civ. P. 26(b)(3) is not applicable to administrative summonses issued under 26 U.S.C. § 7602" (Pet. App. 7a n.13). As the court of appeals concluded, "[t]he IRS simply must show that the inquiry is relevant to a good faith investigation conducted pursuant to a legitimate purpose, that the information sought is not in the IRS' possession and that proper administrative procedures have been followed. *United States* v. *Powell*, 379 U.S. 48, 57–58 (1964)" (Pet. App. 7a n.13).[6]

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[6] Special Agent Nowak further swore that "no recommendation for prosecution of the taxpayer has been made to the United States Department of Justice" (J.A. 21a, see also *id.* at 57a).

Petitioners correctly point out (Br. 59 n.73) that on September 17, 1979, after the decision of the court of appeals in this case, the Internal Revenue Service made a recommendation to the Department of Justice regarding a criminal prosecution that might arguably be related to the investigation that led to the issuance of the summonses here. Since the enforceability of a summons is determined by the facts existing at the time of its issuance (see *Couch* v. *United States*, 409 U.S. 322, 329 n.9 (1973)), the Service's subsequent recommendation should have no bearing on this case. However, because the nature of that prosecution is not part of the record before the Court, we agreed with petitioners at the time they filed their brief that any claim that the Service's recommendation rendered the summons unenforceable under *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978) should be addressed by the district court in the first instance. However, on July 30, 1980, the Assistant Attorney General in charge of the Tax Division advised petitioners' counsel that the Department of Justice had declined the Service's prosecution recommendation and had transmitted the case back to the Internal Revenue Service. For the convenience of the Court, we have lodged copies of these letters with the Clerk. Hence, the Service's post-summons recommendation for prosecution is no longer an issue in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

I.

The principal question presented in this case—involving the proper scope of the attorney-client privilege in the context of communications from corporate employees to the corporation's counsel—is one over which the courts of appeals have divided and which this Court left unresolved in *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided Court, 400 U.S. 348 (1971). As illustrated by the instant case, the issue is important for the enforcement of the internal revenue laws when the Commissioner issues summonses to compel disclosure of corporate records in accordance with his authority under 26 U.S.C. 7602. But the significance of the attorney-client privilege in the corporate setting is not limited to IRS summons enforcement proceedings. Since the corporation is a fact of modern business life in virtually every sphere of commercial activity, the issue of the attorney-client privilege could arise in other disputes between a federal agency and a corporation or in the context of a grand jury investigation. Moreover, as the decisions of the lower courts demonstrate, the question has significance as well for private litigation involving corporations.

The decision of this Court as to the proper test for the attorney-client privilege for corporations will govern a broad spectrum of litigation arising in the federal courts. Rule 501 of the Federal Rules of Evidence states that in the absence of any constitutional or statutory provision or judicial rule, "the privilege of a witness * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The federal courts have accordingly looked to "federal common law" in determining the scope of evidentiary privileges in summons enforcement proceedings as in analogous grand jury proceedings.[7]

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[7] See, *e.g.*, *United States* v. *Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); *Colton* v. *United States*, 306 F.2d 633, 636 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963). See also *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373, 379 (3d Cir. 1976); *In re Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir.), cert. denied, 439 U.S. 1046 (1978); *United States* v. *Holmes*, 594 F.2d 1167, 1171 (8th Cir. 1979); *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977).

Thus, this Court's resolution of the conflict among the circuits with respect to the question involving the attorney-client privilege will establish a uniform rule for summons enforcement and grand jury proceedings, federal criminal cases, and other cases involving claims arising under federal statutes.

A. While the question before the Court involves the limits of the attorney-client privilege in the corporate setting, we submit at the outset that the record in this case supports the district court's conclusion that the employee communications sought by the summons were neither made in confidence nor maintained in confidence in an attorney-client relationship. In urging Upjohn's employees to cooperate with the Company's internal investigation into questionable foreign payments, the Chairman of the Board did not limit their communications to counsel but permitted them to discuss the matter with anyone employed by the Company as well as the Company's regularly employed outside accountants. Moreover, petitioner Gerard Thomas, who gathered the information sought by the summons here, was a member of senior management as well as the Company's general counsel. Finally, Upjohn's subsequent disclosures to the IRS of part of the material sought by the summons amounted to a waiver of the attorney-client privilege with respect to the remaining employee communications. Indeed, this rule against partial waiver is designed to prevent the very stratagem employed by Upjohn in this tax investigation—disclosing only so much of allegedly privileged matter as is helpful to its case. The attorney-client privilege cannot be selectively invoked with respect to the same subject matter so as to be used as both a sword and a shield. 8 J. Wigmore, *Evidence* § 2327 (McNaughton rev. 1961). Thus, whatever the scope of the attorney-client privilege in the corporate setting, the decision of the court of appeals can be affirmed on the independent ground that the privilege never attached or that Upjohn waived whatever privilege might have attached.

B. The rule that we urge here in determining the scope of the attorney-client privilege in the corporate setting is the control group test. Under that test, applied by the courts below in the instant case and by many other deci-

sions as well,[8] the privilege is limited to communications from those senior officers or employees of the corporation who control or play a substantial role in any decision the corporation may make as a result of the advice of counsel. Petitioners, however, seek a much broader privilege that would cloak virtually all communications between corporate employees and corporate counsel in accordance with the so-called "subject matter" test. In petitioners' view, the attorney-client privilege should protect all communications without regard to the employee's function in the corporate structure, if the communication is made by the employee at the direction of his superiors and the subject matter of the communication concerns the performance of the employee's duties.[9]

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[8] See, *e.g.*, *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa.), petition for mandamus and prohibition denied, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963); *Natta* v. *Hogan*, 392 F.2d 686 (10th Cir. 1968); *In re Grand Jury Investigation* (*Sun Co.*), 599 F.2d 1224 (3d Cir. 1979); *United States* v. *Amerada Hess Corp.*, 619 F.2d 980 (3d Cir. 1980). See also *Potashnick* v. *Port City Const. Co.*, 609 F.2d 1101, 1119 n.12 (5th Cir. 1980); *Virginia Electric & Power Co.* v. *Sun Shipbuilding & D.D. Co.*, 68 F.R.D. 397 (E.D. Va. 1975); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970); *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963); *United States* v. *IBM*, 66 F.R.D. 154 (S.D. N.Y. 1974).

The control group test has been adopted by statute in six states: Arkansas (Ark. Stat. Ann. § 28-1001, Rule 502(a)(2) (repl. 1979)); Maine (Me. Rev. Stat. Ann., Rules of Evidence, Rule 502); Nevada (Nev. Rev. Stat. § 49.075 (1979)); North Dakota (N.D. Cent. Code Ann., Rules of Evidence, Rule 502 (Supp. 1979)); Oklahoma (Okla. Stat. Ann. tit. 12, § 2502 (West 1980)); South Dakota (S.D. Codified Laws Ann. § 19-13-2, Rules of Evidence (rev. 1979)).

Moreover, the control group test has been adopted in Rule 502(a)(2) of the Uniform Rules of Evidence. Although it was originally incorporated in the Proposed Federal Rules of Evidence, it was withdrawn in 1971 largely as a result of the affirmance by an equally divided Court in *Harper & Row Publishers, Inc.* v. *Decker*, *supra*. See 2 J. Weinstein & M. Berger, *Evidence* ¶ 503[01] (1979).

[9] The subject matter test was first announced by the Seventh Circuit in *Harper & Row Publishers, Inc.* v. *Decker*, *supra*, and followed in modified form in *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1977) (en banc). See pages 40-43, *infra*. See also *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1165 (D. S.C. 1974); *Hasso* v. *Retail Credit Co.*, 58 F.R.D. 425 (E.D. Pa. 1973); *Syl-*

As we shall show (pages 26–45, *infra*), the control group test is more consistent with the policies underlying the attorney-client privilege. The principal contemporary justification for the attorney-client privilege is its presumed value in encouraging clients to make full disclosures to their attorneys. 8 J. Wigmore, *supra*, §§ 2291, and 2306, at 590. If damaging information could more readily be obtained from an attorney following disclosure than from the client himself in the absence of disclosure, a client aware of that fact would be reluctant to confide in his lawyer. See, *e.g.*, *United States* v. *Louisville & N.R.R.*, 236 U.S. 318, 336 (1915). The result would be greater difficulty in obtaining fully informed legal advice. But "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). See also *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (Friendly, J.); *United States* v. *Goldfarb*, 328 F.2d 280 (6th Cir. 1964); 8 J. Wigmore, *supra*, § 2291.

We submit that the communications from Upjohn's employees to petitioner Thomas would have been made in the absence of any protection of the attorney-client privilege. The employees in question were required by R.T. Parfet, Jr., Upjohn's chairman and chief executive officer, to respond to the questionnaires and to cooperate with the inquiry. Moreover, the inquiry itself was directed to the Company's employees by petitioner Thomas, a vice president and director. Hence, the employees' incentive to cooperate was not prompted by the protection afforded by the attorney-client privilege but by the fact that their superiors directed them to cooperate and that this direction was made in the corporate chain of command. In every practical sense of the word, Upjohn's middle and lower-level employees were not Thomas' clients; they were company subordinates reporting to him at the direction of

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gab Steel & Wire Corp. v. *Imoco-Gateway Corp.*, 62 F.R.D. 454 (N.D. Ill. 1974), aff'd, 534 F.2d 330 (7th Cir. 1976) (table); *In re Ampicillin Antitrust Litigation*, 25 Fed. R. Serv. 2d 1248, 1254–1255 (D. D.C. 1978).

senior management who initiated the inquiry upon the recommendation of counsel and appointed Thomas to conduct it. Only this senior management had the authority and discretion to control the corporation's response to any legal advice sought, and thus only they were, in effect, the corporate client whose communications with counsel should be protected by the attorney-client privilege. Indeed, the Company's disclosure to the IRS of the information provided by many of its employees, without even informing, much less consulting, them, strongly supports the inference that senior management, who made the decision to disclose (and thereby waived any claim of privilege) was the client, and not the company's middle and lower-level employees.

C. The control group test is consistent with this Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947), which formulated the qualified attorney work product doctrine now codified in Fed. R. Civ. P. 26(b). There, in considering whether an attorney's notes of interviews with his client's employees were subject to discovery by opposing counsel, the Court at the outset rejected the claim that the statements were protected by the attorney-client privilege. In this respect, the Court stated, "We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis" (329 U.S. at 508).

D. The control group is a practicable, flexible standard that is in accord with the realities of corporate life. Indeed, the opinion of the court of appeals effectively meets petitioners' claim that the real decision-makers in a corporation are often lower-level or middle-level management who are not included in the control group. The court defined a control group as "those officers, *usually* top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given" (Pet. App. 5a; emphasis added). Here, where the necessary decisions were to be made by the senior officers and the board of directors, these officers and directors constituted the "control group." If, on the other hand, a district manager needed legal advice on a decision that he was to make, he would be in the control group for purposes of that decision.

E. The subject matter test urged by petitioners is unrelated to the policies underlying the attorney-client privilege and is subject to abuse. Under the subject matter test, the attorney-client privilege encompasses all communications made by a corporation's employees to corporate counsel where the communication is made at the direction of the employee's superiors and the subject of the communication is the performance by the employee of the duties of his employment.

Under the subject matter test, corporations would be allowed to use privileged communications to collect information about the activities of lower-level employees which they would collect regardless of the privilege. The subject matter test therefore fails to reflect the policy of the privilege to encourage communications with counsel that would otherwise not be made.

Indeed, the overly broad subject matter test would encourage corporations to create a "zone of silence" around any information that has potential legal consequences by funneling such information through house counsel. Such manipulation of the attorney-client privilege and the use of corporate executives (such as petitioner Thomas) who happen to be lawyers to perform what are essentially non-legal fact gathering tasks would undermine the legitimate right of law enforcement agencies "to satisfy themselves that corporate behavior is consistent with the law and the public interest." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950).

II.

The work product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947), does not protect the documentary evidence sought by the Internal Revenue Service summons here from compelled disclosure because the government showed ample necessity for the production of that evidence.

We do not quarrel with petitioners' submission that the work product doctrine is applicable to IRS summons enforcement proceedings. Apart from the decision below, the sole appellate authority to the contrary, *United States* v. *McKay*, 372 F.2d 174, 176 (5th Cir. 1967), relied upon the analogy of the Commissioner's summons authority to the

inquisitorial power of the grand jury. But the courts of appeals have subsequently held without exception that the work product rule is applicable to a grand jury subpoena.[10] Since there appear to be no unique characteristics or special policies inherent in summons enforcement cases that would foreclose similar application of the work product doctrine in that context, we agree that the *Hickman* rationale and Rule 26(b), Fed. R. Civ. P., can be invoked to resist production of an attorney's work product pursuant to an internal revenue summons.

This is not to say, however, that petitioners' work product claim should defeat enforcement of the summons at issue here. We submit that the district court's finding—left undisturbed by the court of appeals—that "the record establishes ample necessity for compelling disclosure of the summoned material in this case" (Pet. App. 30a; J.A. 192a)—is correct and presents a proper basis for affirmance of the judgment rejecting petitioners' work product claim.

Here, the government seeks from counsel copies of questionnaires submitted to him by Upjohn's employees and his notes of interviews with such employees with respect to questionable payments they made abroad on behalf of the Company. Some of the employees are no longer with the Company. Most of the remaining employees are located throughout the world, some in countries where the government representatives would not have easy access. While Upjohn has offered to transport these employees to a neutral country, it has forbidden its employees to discuss with the Internal Revenue Service any payments that Upjohn has concluded are irrelevant. Since the interviews are to be conducted according to ground rules established by Upjohn and Upjohn refuses to allow its employees to discuss certain information, it is clear that absent production of the questionnaires and interviews the information is unavailable to the Internal Revenue Service. Furthermore, many of the employees are foreign nationals who may not be subject to the process of the federal

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[10] See *In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc.*, 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224 (3d Cir. 1979); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1973).

courts. The information sought by the summons is therefore not available by direct examination of the employees—whose fading memories of the myriad transactions involved are, in any event, a far less accurate source than the questionnaires and interview notes for determining Upjohn's correct tax liability.

ARGUMENT

I

THE ATTORNEY-CLIENT PRIVILEGE PROTECTS AGAINST THE COMPELLED DISCLOSURE OF COMMUNICATIONS BETWEEN A CORPORATION'S GENERAL COUNSEL AND ITS EMPLOYEES ONLY WHEN SUCH COMMUNICATIONS ARE MAINTAINED IN CONFIDENCE AND THE EMPLOYEES ARE PART OF A "CONTROL GROUP" WHICH PLAYS A SUBSTANTIAL ROLE IN DIRECTING THE CORPORATION'S RESPONSE TO THE LEGAL ADVICE SOUGHT

As the Court reaffirmed only last Term in *Trammel* v. *United States*, No. 78–5705 (Feb. 27, 1980), slip op. 10, quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950), any claim of privilege must overcome the settled principle that " 'the public * * * has a right to every man's evidence.' " Accord: *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). See also *Herbert* v. *Lando*, 441 U.S. 153, 175 (1979); *Blackmer* v. *United States*, 284 U.S. 421, 438 (1932); 8 J. Wigmore, *supra*, § 2192. Because testimonial privileges preclude the use of highly relevant evidence and therefore tend to be "an obstacle to the administration of justice" (*id.* § 2192, at 73; see *United States* v. *Nixon*, *supra*, 418 U.S. at 711–713), such privileges are tolerable only when they "are designed to protect weighty and legitimate competing interests" (*id.* at 709). See also *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

In a claim of attorney-client privilege, the weighty and legitimate competing interests are particularly difficult to

establish because that privilege rests upon grounds that are not objectively demonstrable. As we have noted (page 14, *supra*), the principal justification for the privilege is to encourage a client to place in his lawyer the "unrestricted and unbounded confidence" (*United States* v. *Kovel*, 296 F.2d 918, 921 (2d Cir. 1961)) that is viewed as essential to the protection of his legal rights.[11] But whether and to what extent the privilege actually does promote candor in lawyer-client relations remains a subject of considerable dispute. The only serious empirical study of the subject suggests that the presumed correlation between the privilege and client candor may not in fact exist. See Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226 (1962). Given the complexity of modern corporate life, clients of necessity seek out attorneys largely because there is no ready substitute for legal advice.[12] Their candor with their lawyers may be encouraged by the privilege, but surely must result principally from a realization that the costs of withholding information are likely to be far greater than the disadvantages flowing from the risk of compelled disclosure of their

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[11] The privilege originated as a protection for the attorney's honor—allowing him to keep the confidence of his client—and it belonged to the attorney alone. 8 J. Wigmore, *supra*, § 2290. In the eighteenth century, this reasoning fell into disrepute. Since that time, the privilege has been justified as necessary to encourage full disclosure by the client. At the time of this shift in the rationale of the privilege, the client himself could not be called to testify in either civil or criminal proceedings. Accordingly, in the absence of any privilege, any confidence reposed in an attorney would have provided a substantial addition to the sources of proof available to the client's opponent. 8 J. Wigmore, *supra*, § 2290; 2 J. Weinstein & M. Berger, *Evidence* ¶ 503[02] (1979). Under present practice, however, a party must respond to discovery and must testify if called, subject only to his privilege against compulsory self-incrimination. Accordingly, it is questionable whether the privilege is still as helpful as it once was in encouraging the client's confidence. See *Whiting* v. *Barney*, 30 N.Y. 330, 332–333 (1864).

[12] It is now well settled that the attorney-client privilege is available to corporations. *Radiant Burners, Inc.* v. *American Gas Ass'n*, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929 (1963).

confidential communications. Indeed, even assuming that corporate employees are aware of the privilege (although there is no suggestion that Upjohn's employees were so aware in this case at the time they participated in Thomas' inquiry), the uncertainty as to whether the privilege applies to a particular communication greatly weakens the basis for any presumption that such an employee in fact relied upon it.

The classic definition of the attorney-client privilege is set forth in *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 358–359 (D. Mass. 1950):

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Accord: 8 J. Wigmore, *supra*, § 2292.

Like other privileges or immunities, the attorney-client privilege stands in derogation of the public's "right to every man's evidence" (8 J. Wigmore, *supra*, § 2192, at 70), and as "an obstacle to the investigation of the truth" (*id.*, § 2291 at 554). Accordingly, "[i]t ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle" (*ibid.*). As Dean Wigmore succinctly put it, "Its benefits are all indirect and speculative; its obstruction is plain and concrete" (*ibid.*). Given the high social cost of immunizing a class of evidence from discovery, it is vital to a claim of privilege that the communications between client and attorney are made in confidence and maintained in confidence. And, as with all privileges, the claimant has the burden of establishing all essential elements. *United States* v. *Kovel*, *supra*, 296 F.2d at 923.

A. The Attorney-Client Privilege Should Not Protect Upjohn's Employees' Communications Because They Were Neither Made In Confidence Nor Maintained In Confidence In An Attorney-Client Relationship

While the principal question before the Court involves the propriety of the control group test in establishing the limits of the attorney-client privilege in the corporate setting, we submit at the outset that the privilege never attached because the communications were not made in the context of an attorney-client relationship. Moreover, even if the privilege did attach, petitioner Upjohn waived it because of its failure to maintain such communications in confidence.

1. Petitioner Thomas' multiple roles in the corporation as vice-president, secretary, director, and general counsel make it unclear whether he conducted the inquiry in his capacity as an attorney. In this respect, it is significant that Chairman Parfet's initial letter of January 16, 1976, did not identify Gerard Thomas as the Company's general counsel. Rather, he simply advised the employees that he had "asked Gerard Thomas to investigate certain matters of particular concern to Corporate Management and to the Board of Directors" (J.A. 39a). While Parfet later, in the March 8 letter accompanying the questionnaire, identified Thomas as the Company's general counsel (J.A. 40a), it is not clear that the employees submitted the information to Thomas in his capacity as a lawyer for the purpose of obtaining legal advice or intended the submission to be a confidential communication in a context of an attorney-client relationship. Indeed, given Thomas' other roles as officer and director and the fact that the employees were directed to cooperate with him as with any other company executive in the chain of corporate command, the case for application of the attorney-client privilege is hardly compelling. To the contrary, the record suggests that the employees made the communications for business purposes, rather than for the purpose of securing legal services. In these circumstances, petitioners have not carried their burden of establishing that the privilege ever attached to the communications at issue here.[13]

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[13] Petitioners argue (Br. 12 n.4) that the court of appeals left undisturbed findings that legal advice had been sought by Upjohn from

2. It is, of course, settled that the client's subsequent disclosure to a third party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed, either because such disclosure indicates that confidentiality is no longer intended or serves as a waiver of the privilege.[14] As Judge Friendly observed in *In re Horowitz*, *supra*, 482 F.2d at 81–82, "it is vital to a claim of privilege that the communications between client and attorney were made in confidence and have been maintained in confidence."

The record in this case supports the district court's conclusion (Pet. App. 23a–25a; J.A. 185a–187a) that the communications at issue were neither made in confidence nor maintained in confidence. To begin with, Chairman Parfet's letter of March 8, 1976, accompanying the questionnaire permitted the employees to discuss the matter with "your management" (J.A. 43a). The only limitation imposed upon the employees was not to discuss the investigation "with anyone not employed by the Company except our regularly retained public accounting firms and such persons as are specifically designated by Mr. Thomas" (*ibid.*). Clearly, any communications with the Company's auditors or management would not be covered

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professional legal counsel. But the cited record references to the magistrate's findings of fact (Pet. App. 12a–13a; J.A. 174a–175a) simply set forth the undisputed fact that Thomas "conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the Company with respect to the payments" (Pet. App. 13a; J.A. 175a). They do not, however, support the conclusion that Thomas functioned in the capacity of an attorney rather than as a company executive vis-a-vis the company employees so as to cloak their communications to him under the attorney-client privilege. At all events, the magistrate's findings do not support the conclusion that Upjohn's employees knew that they were communicating with Thomas as an attorney. Hence, there are no findings that support the existence of an attorney-client privilege with respect to the communications at issue.

[14] See 8 J. Wigmore, *supra*, § 2311, at 599; D. McCormick, *Evidence* § 93, at 197 (Cleary ed. 1972); Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953, 981 (1956); *United States* v. *Cote*, 456 F.2d 142 (8th Cir. 1972); *United States* v. *Schoeberlein*, 335 F. Supp. 1048 (D. Md. 1971); *B&C Trucking Co.* v. *Holmes & Narver, Inc.*, 39 F.R.D. 317 (D. Hawaii 1966); *United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954).

by the privilege and other persons designated by Thomas might not be covered as well.

Whatever further fact finding might reveal as to the degree of confidentiality maintained by Upjohn's employees with respect to the information produced by Thomas' investigation, the Company's subsequent disclosures to the Internal Revenue Service resulted in a waiver of the privilege. As a general rule, a waiver of the privilege as to all communications between an attorney and client on the same subject follows from the voluntary waiver of one or more similar communications. This is the case even if the disclosures are accompanied with reservations. "Thus, if a client, through his attorney, voluntarily waives certain communications, but guarded with a specific written or oral assertion at the time of the waiver that it is not its intention to waive the privilege as to the remainder of all similar communications, the privilege, as to the remaining undisclosed communications, is nevertheless waived." *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1162 (D. S.C. 1974). Indeed, this rule against partial waiver is designed to prevent the very stratagem employed by Upjohn in this tax investigation—disclosing only so much of allegedly privileged matter as is helpful to its case.

The attorney-client privilege cannot be selectively invoked so as to be used as both a sword and a shield. See 8 J. Wigmore, *supra*, § 2327 (the "principle of completeness" is analogous to this principle); D. McCormick, *supra*, § 93. As the court observed in *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974), "Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter." Thus, even assuming that the employees' communications were once privileged, Upjohn's partial disclosures to the IRS amounted to a waiver of the privilege with respect to the material sought by the summons. The attorney-client privilege cannot be invoked to aid Upjohn's uncorroborated self-serving claim that the withheld evidence has no bearing on its United States tax liability.[15]

[15] Contrary to Upjohn's contention (Br. 6 n.2), questionable payments by controlled foreign subsidiaries could affect its United States

Contrary to petitioners' argument (Br. 12 n.4), which the court of appeals apparently accepted (Pet. App. 7a n.12), for purposes of determining whether a waiver occurred, there is no basis for a distinction between the facts

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tax liability for the years in issue in some circumstances. To begin with, if the subsidiaries improperly deducted the questionable payments in derogation of Section 162(c) of the 1954 Code (26 U.S.C.) and joined in the consolidated return, those deductions would of necessity have understated Upjohn's United States tax liability. The summons in this case is intended in part to corroborate Upjohn's assertion that it has accounted for all questionable payments made by its subsidiaries which were part of the consolidated group.

But even on the assumption that there are no remaining questionable payments of members of the consolidated group to be disclosed, Upjohn's United States tax liability may nevertheless be affected. Section 951 of the Code provides that a United States shareholder of a "controlled foreign corporation" shall include in income his pro rata share of the controlled foreign corporation's Subpart F income. Subpart F income is defined in Section 952, and is specifically limited by Section 952(c) to the earnings and profits of the controlled corporation for the taxable year, as defined in Section 964. During the tax years in issue, the earnings and profits of the controlled subsidiary could have been reduced by illegal bribes or kickbacks although no deduction would have been allowed under Section 162(c). See Rev. Rul. 77-442, 1977-2 Cum. Bull. 264. (Section 1065 of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1653, added Section 952(a)(4) specifically to include in Subpart F income any illegal bribes, kickbacks or other payments, and amended Section 964(a) to provide that such payments, made after November 3, 1976, shall not reduce earnings and profits for purposes of Subpart F (see Section 1066 of the Tax Reform Act of 1976, 90 Stat. 1654)). Accordingly, Upjohn argues that any such payments by controlled foreign corporations before November 3, 1976, could not have affected its consolidated income tax returns for the years in issue because such payments, by reducing earnings and profits, would have been eliminated from Subpart F income.

Although the computation of Subpart F income may not be affected, there may be situations where payments were made by a subsidiary, not for its own benefit, but for the benefit of the parent or another member of the consolidated group. Depending on the factual circumstances, the Commissioner might determine that such payments require reallocation of income between Upjohn and its controlled foreign subsidiaries under Section 482, or that they were constructive dividends to the beneficiary of such payments. See generally B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶¶ 7.05, 15.06 (4th ed. 1979). Indeed, David S. Creamer, manager of Upjohn's corporate tax planning unit, conceded on cross-examination (J.A. 138a, 146a-147a) that there could be numerous ways in which the parent's tax liability could be affected. Such results are

disclosed by Upjohn to the IRS and the original communications to counsel from which they were selectively gleaned. Surely whether a waiver of the attorney-client privilege occurred cannot turn upon whether the piece of paper containing the disclosed facts is the original client communication or another document upon which those facts have been recorded.[16]

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not affected by Rev. Rul. 77-442, *supra*, the authority upon which petitioners rely. That ruling addresses only the determination of earnings and profits, and does not speak to the question of possible constructive dividends or Section 482 allocations. As Creamer's testimony indicates, it is therefore erroneous to conclude that these payments could never affect Upjohn's United States tax liability. Since the tax consequences of these payments depend on the circumstances surrounding the payments, the Commissioner is entitled to summon the evidence necessary to make an independent determination of Upjohn's tax liability pursuant to his authority under 26 U.S.C. 7602.

[16] In this respect, *United States* v. *Cote*, 456 F.2d 142 (8th Cir. 1972), upon which the court of appeals relied for its conclusion that no waiver occurred (Pet. App. 7a n.12), actually supports our submission that Upjohn waived the privilege with respect to all the documents sought by the summons. There, the taxpayer's filing of a tax return, which contained in part information set forth on otherwise privileged workpapers, was held to be a "disclosure [that] effectively waived the privilege not only to the transmitted data but also as to the details underlying that information" (456 F.2d at 145). Here, too, Upjohn's partial disclosure of the substance of its employees' communications concerning questionable payments waived the privilege with respect to all of its communications with counsel with respect to that subject. As the court stated in *United States* v. *Tellier*, 255 F.2d 441, 448 (2d Cir.), cert. denied, 358 U.S. 821 (1958), "the privilege attaches to the substance of a communication and not to the particular words used to express the communication's content." See also *United States* v. *Shibley*, 112 F. Supp. 734, 742 (S.D. Cal. 1953).

The other authorities cited by the court of appeals (Pet. App. 7a n.12) do not support its distinction between a waiver of the facts disclosed by Upjohn and the underlying data. Neither *United States* v. *Judson*, 322 F.2d 460 (9th Cir. 1963), nor *Colton* v. *United States*, 306 F.2d 633, 639 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963), involved a waiver. Moreover, unlike this case, *IBM* v. *Sperry Rand Corp.*, 44 F.R.D. 10, 13 (D. Del. 1968), involved a waiver "to the limited extent" of a particular subject discussed in a set of documents. Here, on the other hand, the evidence sought by the summons involves a single subject, *viz.*, Upjohn's questionable payments.

In our view, Upjohn's selective disclosures to the IRS waived the attorney-client privilege. Thus, whatever the scope of the attorney-client privilege in the corporate setting, the decision of the court of appeals can be affirmed on the independent ground that Upjohn waived the privilege.[17]

B. The Control Group Test Is Consistent With The Policy Underlying The Attorney-Client Privilege Of Encouraging Clients To Make Full Disclosure To Their Attorneys

1. As we have pointed out (pages 14, 19, *supra*), the principal policy justification for the attorney-client privilege is to encourage clients to make full disclosure to their attorneys without fear that their attorneys would become witnesses against them. "However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." *Fisher* v. *United States*, *supra*, 425 U.S. at 403.

Here, Upjohn's employees would have made the disclosures to petitioner Thomas in the absence of the privilege. Their factual submissions to Thomas were made pursuant to the orders of R.T. Parfet, Jr., the chairman and chief executive officer of the Company, and were not prompted or encouraged by the protection of the attorney-client privilege. In directing the employees to cooperate with the investigation, neither Parfet nor Thomas gave any assurances to the employees that their disclosures would be protected by the attorney-client privilege. Given their subordinate place in the corporate hierarchy, Upjohn's

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[17] If the Court holds that the privilege did not attach or that Upjohn waived the privilege, the case should be remanded to the court of appeals with instructions to modify its judgment so that the summons could be immediately enforced. In these circumstances, there would no longer be any need for the district court to determine which communications were made by members of the "control group" (see Pet. App. 7a).

employees could hardly have refused to cooperate with Parfet's directive to provide Thomas with the pertinent information necessary to make business decisions on behalf of the Company.

Thus, the attorney-client privilege did not play any part in encouraging Upjohn's employees to make the required disclosures; they did so in compliance with an order issued to them in the corporate chain of command. Indeed, the fact that Upjohn's senior management ultimately decided to disclose many of the employees' statements to the SEC and the IRS—without so much as advising the employees that such disclosures were being made (Pet. App. 22a–23a; J.A. 18a, 184a–185a)—graphically demonstrates that the employees did not rely upon the attorney-client privilege in cooperating with Thomas' investigation. If the privilege protected these statements, the Company's senior management surely would have had to consult with the affected employees prior to the disclosure of their statements to law enforcement agencies. Hence, it is plain that the employees had no privilege either at the time they made their communications or at the time Upjohn determined to disclose them in part. In fact, the decision by Upjohn's senior management to make the disclosures to the IRS shows that senior management, with authority to act for the corporation in this matter, and not the employees, was in fact the client of Thomas as the alter ego of his corporate client and confirms the correctness of the control group test.[18]

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[18] Petitioners suggest (Br. 39 n.41) that the argument that a corporation will disclose information provided to its counsel by non-control group employees "ignores reality" because it will discourage the employees from cooperating with counsel. In support of this contention, they claim "that there are few cases where the corporation has waived the privilege vis-a-vis the employee" (*ibid.*). See also Amicus Curiae Brief of the American College of Trial Lawyers at 13 n.10. But one need go no further than this case for an instance where management has made such a disclosure. Indeed, any employee who is seriously concerned about his own potential liability cannot rely on what the corporation has done in the past. Rather, he must be aware of what the corporation has the power to do.

Petitioners further urge (Br. 39 n.41) that the solution is to broaden, rather than narrow, the corporation's privilege to alleviate this problem. But the employee whose disclosures are communicated to man-

As the representative officials of the client, the control group had the authority to make disclosures on behalf of the company in accordance with the advice of counsel and therefore play a role in directing the corporation's response to the legal advice sought. It is accordingly the communications of the control group with counsel that are protected by the attorney-client privilege.

In light of the foregoing, it is clear that even on the assumption that the attorney-client privilege applies to communications of employees outside the control group, such employees could not depend upon any assurance of confidentiality conferred by the privilege because, in fact, there is none from their standpoint. Corporate counsel interviewing employees outside the control group cannot promise them that their communications will remain confidential. To the contrary, candid counsel must advise such employees that in all likelihood their communications will be revealed to their supervisors and that their communications might be disclosed to law enforcement or regulatory agencies if the corporate control group determines that such disclosure is in the best interests of the corporation. The destiny of each communication necessarily rests in the hands of the control group; and, like them, the corporation's counsel owes his professional loyalty to his corporate client rather than to the individual non-control group employees. Accordingly, the corporation's attorney-client privilege cannot encourage a non-control group employee interviewed by corporate counsel to disclose any more than he would be willing to disclose to any other management representative. In short, the subordinate employee's willingness to cooperate with corporate counsel is therefore solely a function of his deference to the corporate chain of command and bears no relationship to the availability of the attorney-client privilege. Since extension of the attorney-client privilege to protect the employees' communications would not achieve its purpose of encouraging candid disclosure, the privilege should not apply to such evidence.

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agement through its counsel can in no event have an independent privilege that would restrict management's use of the information. There is no escaping the fact that management, and not the lower-level employee, is the client who has the privilege and who has full authority to disclose the information transmitted by the employee.

2.a. Given the fact that the employees would have made the disclosures even in the absence of the attorney-client privilege, there is no basis for petitioners' contention (Br. 35, 39) that the control group test would inhibit communications between corporate counsel and employees outside the control group. The attorney's need to consult such employees does not necessarily dictate that their communications should be privileged. The policy of the attorney-client privilege demands that it apply only when it would enhance candid disclosure. That is not the case with respect to employees outside the control group. As the Third Circuit correctly concluded in *In re Grand Jury Investigation* (*Sun Co.*), *supra*, 599 F.2d at 1236, such employees would in all events confide in corporate counsel whether or not the privilege were applicable. "In short, we do not believe that extension of the corporation's privilege against disclosure would significantly add to an attorney's ability to obtain information from employees outside the control group" (*ibid.*). Accordingly, the control group test will not discourage lower-level employees from cooperating with corporate counsel. Such employees respond to such inquiries because they are directed to do so by corporate management.

b. Nor will the application of the control group test discourage a corporation from conducting internal investigations or dissuade corporate counsel from ferreting out the necessary information in such investigations. Despite petitioners' (Br. 35–41) and several of the amici curiae's assertions to the contrary (American Bar Association Br. 15–17; American College of Trial Lawyers Br. 23–28; Federal Bar Association Br. 18), even in the absence of the privilege, corporate management will continue to conduct such investigations in a thorough manner simply because they have little choice.

A corporation has a strong incentive to monitor the activities of all its employees that might expose it to liability. Though the directors who ultimately control the activities of a corporation may usually rely on the officers' good faith and on the books of account of the corporation, generally applicable fiduciary principles impose upon directors an affirmative duty to act with reasonable diligence to inquire into the facts and to take whatever corrective action is required when the propriety of the offi-

cers' conduct or the accuracy of the corporate books is called into question, as the outside auditors did in the instant case. See 3A W. Fletcher, *Cyclopedia of Private Corporations* § 1039, at 38 (M. Wolf rev. 1975). Failure to conform to these responsibilities may implicate the directors and the corporations on whose boards they serve in violations of state corporate laws or the federal securities laws. See *Graham* v. *Allis-Chalmers Manufacturing Co.*, 41 Del. Ch. 78, 85, 188 A.2d 125, 130 (1963); 15 U.S.C. 77o; 15 U.S.C. 78t. As the Third Circuit correctly noted in *In re Grand Jury Investigation* (*Sun Co.*), *supra*, 599 F.2d at 1237, "the potential costs of undetected noncompliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential."[19]

The fact that communications similar to those made by Upjohn's employees would have taken place without regard to the availability of the attorney-client privilege is graphically illustrated by the facts of this case. In the course of an audit by Upjohn's independent auditors, the corporation's control group was notified of the existence of certain questionable payments made by employees stationed abroad. Thus, they were put on notice that the corporate books might not have projected an accurate financial picture. Although the extent of the payments was unknown, the possibility clearly existed that Upjohn's financial statements were materially inaccurate or that the payments had exposed the Company to potential liabilities that had to be disclosed. An investigation into the scope and nature of these payments was therefore required. The chairman turned to one of the officers, who served as well as general counsel, and ordered him to obtain the factual

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[19] See 15 U.S.C. (Supp. I) 78m(b)(2). Under this provision, which Congress added to the Securities Exchange Act of 1934, 15 U.S.C. 77b *et seq.*, as a part of the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, every publicly held company is required to keep accurate books and records and maintain internal accounting controls that are sufficient to provide, *inter alia*, reasonable assurances that transactions are executed and recorded in accordance with management's direction. This statute was enacted as a result of information submitted in the SEC's voluntary disclosure program. See page 31 and note 20, *infra*.

information from the lower-level employees that was required for the Company to make the proper business decisions. The chairman directed those employees to respond fully and accurately to the inquiry. At the time Upjohn initiated this investigation, the scope of the attorney-client privilege in the corporate context was unsettled. Thus, the corporation had no guarantee that the information provided by the lower-level employees was protected by the attorney-client privilege. The investigation nevertheless proceeded. It is therefore apparent that the existence *vel non* of the attorney-client privilege did nothing either to encourage the initiation of the investigation or to delineate its scope. The investigation was undertaken simply because good "business sense" required it.[20]

Nor is there merit in petitioners' suggestion (Br. 35) that an attorney operating under the control group test "will be uncomfortably aware that any information he elicits [from a non-control group employee] might later be used against the corporation or the employee by an adver-

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[20] The investigation was also prompted by petitioner's desire to participate in the SEC's voluntary disclosure program. Under this program, petitioners were aware that the SEC could require disclosure of the supporting documents. The Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, submitted to the Senate Banking, Housing and Urban Affairs Committee, May 12, 1976 (*reprinted in* Fed. Sec. L. Rep. (CCH) No. 642, at 9 n.8 (May 19, 1976)), states:

> An essential element of the voluntary disclosure program is that companies must agree to grant the Division of Enforcement access to the report and its underlying documentation.
>
> Materials submitted to the Commission may be subject to release under the Freedom of Information Act or pursuant to Congressional requests. * * *

Moreover, petitioner Thomas conceded that the company was willing to disclose whatever documentation the SEC might require in order to obtain the benefits of the program. As he testified (J.A. 120a):

> I think at the time of the disclosure, that we had to make some representation. I can't remember—I believe it was in a letter, but it may have been by verbally that we would, if they felt it was necessary, maybe that—that we would make additional disclosures to their Enforcement Division. I believe the practice was and the implication was that they wouldn't press on that, they wouldn't make us do it; but as part of the voluntary program, we had to agree to do that, if they determined that was necessary.

sary" and, hence, "will be hesitant to probe deeply." Even in the absence of the absolute protection afforded by the attorney-client privilege, communications between counsel and employees outside the control group would be protected in some degree by the qualified work product privilege recognized in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). (See Point II, pages 46–51, *infra*.) Thus, a party seeking production of such material will not have untrammeled access to information collected by an attorney but will have to show necessity for such disclosure. (See Point II, pages 46–51, *infra*.)

At all events, a guarantee of secrecy does not establish or narrow an attorney's obligation in the giving of legal advice to his client. See *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1102 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971). If an attorney is to fulfill his ethical obligation to the corporation to which he is rendering legal advice, he should resolve any fear he may have of disclosure in favor of a complete and comprehensive investigation. See *In re Grand Jury Investigation* (*Sun Co.*), *supra*, 599 F.2d at 1236–1237. A claim that attorneys will ignore their ethical obligations to their clients in the absence of the protection of the attorney-client privilege is poor justification indeed for an extension of the privilege.[21]

C. The Control Group Test Is Consistent With This Court's Decision In *Hickman* v. *Taylor*, 329 U.S. 495 (1947)

1. The Court's analysis in *Hickman* v. *Taylor*, 329 U.S. 495 (1947), which formulated the attorney work product doctrine now codified in Fed. R. Civ. P. 26(b), is consist-

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[21] Petitioners also suggest (Br. 35–36) that if the "control group" test were adopted, a corporate counsel would hesitate to advise strongly against any action which he suspects that his client might ultimately decide to adopt for fear that his advice would be subject to disclosure. But any such advice concerning a possible course of action would be expressed to those within the corporation who would decide upon the course of conduct to be pursued. These individuals would necessarily be members of the control group, and such communications would be privileged. At all events, the prospective decision of the client does not define the attorney's ethical obligation to advise his client fully and completely on all aspects of a proposed course of action. *Garner* v. *Wolfinbarger*, *supra*, 430 F.2d at 1102.

ent with the control group test employed by the courts below. That case involved a wrongful death action against the Taylor & Anderson Towing and Lighterage Company, which was in the business of operating tugboats. One of the boats sank and five crew members drowned. In anticipation of litigation, the company engaged a law firm to defend them against potential lawsuits. In this connection, a member of the law firm took statements from the survivors with an eye toward the anticipated litigation and the survivors signed these statements. In the ensuing litigation, the plaintiffs sought discovery of all such statements. The lawyers for the company refused to comply on the ground that such requests called "for privileged matter obtained in preparation for litigation" and constituted "an attempt to obtain indirectly counsel's private files" (329 U.S. at 499).

In considering whether such material was subject to discovery by plaintiffs' counsel, the Court at the outset rejected the tugboat company's claim that the survivors' statements in its attorney's files were protected by the attorney-client privilege. As the Court stated (329 U.S. at 508):

> We also agree that the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. * * * For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

The situation here is precisely analogous. Here, as in *Hickman*, subordinate employees of a client company responded to questions put by company counsel. Such employees did not engage the counsel nor did they play any role in directing the company's response to the legal advice sought. They are outside the company control group. Hence, their communications to the company counsel are

not protected by the attorney-client privilege because their status is not that of a client but of a subordinate employee charged by superiors to disclose the facts of a particular incident to company counsel.

2. Contrary to the decisions adopting the broader subject matter test, the Court's refusal in *Hickman* to extend the protection of the attorney-client privilege to the lawyer's conversations with the partnership's employees was based upon the status of the employees within the company rather than upon the duties the employees were performing at the time of the accident. Exponents of the "subject-matter" or the modified "subject matter" test seek to avoid the conflict with *Hickman* v. *Taylor* by exempting from the privilege information gathered by employees as mere "bystander witnesses." See *Harper & Row Publishers, Inc.* v. *Decker*, *supra*, 423 F.2d at 491; *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 609 (8th Cir. 1977) (en banc). See *In re Grand Jury Investigation* (*Sun Co.*), *supra*, 599 F.2d at 1235-1236 n.7. Thus, in attempted deference to *Hickman*, the subject matter test requires that, to be privileged, the subject matter of the employee's communications to the attorney be "within the scope of the employee's corporate duties" (*Diversified Industries, Inc.* v. *Meredith*, *supra*, 572 F.2d at 609) and not relate to "fortuitously[ ] observe[d] events which may generate liability on the part of the corporation" (*Harper & Row Publishers, Inc.* v. *Decker*, *supra*, 423 F.2d at 491).

But this attempted reconciliation with *Hickman* cannot withstand analysis. The manner in which an employee obtains his information is entirely unrelated to the issue whether the privilege is required to encourage communication of the information to counsel. Accordingly, the "scope of employment" gloss on the subject matter test does not further any policy of the attorney-client privilege.

More importantly, the subject matter test begs the critical question whether the employee is the "client" whose communications are for the purpose of obtaining legal advice. An employee's regular duties may well include observing and reporting any accident that may subject the corporation to liability. If a corporation were so to state in an employment manual, or to require regular accident reports from employees, such observations might

well then be "nonfortuitous" and "within the scope of the employee's corporate duties" and privileged under the subject matter test. If so, this Court's rejection of the privilege in *Hickman* would be effectively overruled by the fiat of the nation's corporations.

For these reasons, the artificial nature of the "scope of employment" gloss is readily apparent. The crew members in *Hickman* were not "mere bystanders" who fortuitously observed an event that might generate liability. While engaged in the performance of their duties, they witnessed an accident which was a foreseeable possibility within the scope of their employment. The accident clearly involved a matter within the scope of their duties. See *In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc.*, 81 F.R.D. 691, 694 (S.D. N.Y.), rev'd on other grounds, 599 F.2d 504 (2d Cir. 1979). The Court's rejection of the claim of privilege necessarily turned on the employees' subordinate status and not the nature of their duties.

Harper & Row and *Diversified Industries* therefore misread *Hickman*. The employee-attorney communications in *Hickman* were found to be the nonprivileged communications of witnesses not because the employees' observations were outside the scope of their duties, but because the employees' status was outside the "control group" of the tugboat company. The employees were not clients of the attorney.[22] Since the "control group" test turns on the status of the particular employee within the corporation it is consistent with *Hickman*.[23]

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[22] Indeed, had Taylor himself, one of the partners of the tugboat company, been present on the sinking vessel, there can be no doubt that his communications with counsel about the events of the accident would have been privileged, as would the communications of any client in such a situation, even though his observations would not have concerned the subject matter of his business duties. But such communications would not be privileged under the scope of employment test. Thus, unless this Court in *Hickman* intended radically to alter the attorney-client privilege's traditional application to communications between client and attorney, it reached its result on the basis of the status of the employees and not on what they saw. The employees were not the client.

[23] Amicus American College of Trial Lawyers seeks to distinguish *Hickman* (Br. 11 n.7) on the ground that the employees in that case

D. The Control Group Test Is A Practicable Standard For Establishing The Scope Of The Attorney-Client Privilege That Is In Accord With The Realities Of Corporate Life

1. In light of the foregoing, we submit that the control group test is the appropriate standard that furthers the policy of the attorney-client privilege of encouraging client candor and is consistent with this Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). But it is also a practicable test that responds to the countless factual variations that occur in the corporate setting. Thus, the control group test does not inflexibly decree that only certain corporate officials by virtue of their position or rank constitute the control group. As Judge Kirkpatrick stated in his seminal formulation of the test in *City of Philadel-*

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were in an adversarial posture. In support of this purported distinction, they cite a brief parenthetical comment in a statement filed by defense attorney Fortenbaugh after the trial court opinion was entered that "Settlement has been made in various nominal amounts with all of the four survivors * * * " (No. 47 Hickman record at 70a). Fortenbaugh's deposition, however, clearly states (*id.* at 56a) that statements of the survivors were taken as soon as was practicable, as was always the procedure in such cases. There is no indication that an adversarial relationship existed at the time the statements were made and it is clear that no litigation was instituted by any of the survivors (*id.* at 61a).

Of greater import in considering the scope of the Court's opinion in *Hickman*, however, is the fact that no court adverted to any adversarial relationship between the company and its surviving employees in discussing the status of statements of those employees, treating the employees, instead, as mere witnesses at all times. See 329 U.S. at 508; 4 F.R.D. 479, 480 (E.D.Pa.); 153 F.2d 212, 222 (3d Cir. 1945). It is clear from the Court's opinion that it did not view the employer-employee relationship in *Hickman* as sufficient to convert communications of the employee into communications of the client partnership for purposes of the attorney-client privilege. It therefore had no reason even to reach the question posed by amicus American College of Trial Lawyers. Indeed, Judge Kirkpatrick's formulation of the "control group" test in *City of Philadelphia* v. *Westinghouse Electric Corp.*, *supra*, was largely in response to *Hickman* v. *Taylor*, which, according to Judge Kirkpatrick (210 F. Supp. at 485), "very clearly shows the distinction between statements by employees of the client and statements by the client itself." Since Judge Kirkpatrick wrote the trial court opinion in *Hickman* v. *Taylor*, he was fully aware of its factual bases.

phia v. *Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D.Pa.), petition for mandamus and prohibition denied, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963):

> if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

The fact that the composition of the control group may vary from case to case does not, as petitioners contend (Br. 40–44), render the control group test unworkably vague or unpredictable in result. Here, the court of appeals defined the control group as "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given" (Pet. App. 5a; footnote omitted). Contrary to petitioners' assertion, there is nothing in this formulation that is beyond the abilities of the average corporate counsel to understand and apply. In this case, it is undisputed that the corporate officials who sought and received legal advice were the senior officers and directors of the parent corporation (Pet. App. 22a–23a; J.A. 184a–185a). The bulk of the employees interviewed were not within this group. The remand ordered by the court of appeals was not caused by any difficulty in determining who was in the control group, but because some employees, who both parties agree belonged to the control group, were denied the privilege.[24]

We do not quarrel with petitioners' assertion (Br. 42–43) that the control group has been given varying interpretations in various cases. But that fact is hardly surprising in light of the different types of corporate decisions that can

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[24] See Govt. C.A. Br. 17 n.4. For the convenience of the Court, we are lodging a copy of this brief with the Clerk.

be made in these cases. Any reasonable corporate attorney, however, is capable, in a given fact situation, of determining whether he is merely gathering facts from a subordinate employee or is giving legal advice to a decision-maker. The definition of the "control group" is within the ability of the average corporate counsel to understand and apply.

At all events, any minor variations in the composition of the control group from case to case will not discourage candid employee communications with counsel in the corporate setting. This appears to be self-evident from the apparent ability of corporations to function effectively in the past under conditions where the scope of the attorney-client privilege in the corporate context had not been conclusively established and the independent need for such consultations to take place nevertheless existed (see pages 12–15, *supra*).

2. Nor do the variations in the composition of the control group from case to case render the control group insensitive to the realities of corporate life. Petitioners argue (Br. 16–17, 20) that the real decision-makers in a corporation are often lower-level or middle-level management who are not included in the "control group" as determined by the court of appeals. They therefore urge that the "control group" test ignores this aspect of corporate life and deprives the real corporate decision-makers of any privilege whatsoever.

But the opinion of the court of appeals effectively refutes petitioners' claim. In this case, where the necessary decisions were to be made by the senior officers and the board of directors, these officers and directors constituted the "control group." If, on the other hand, a district manager needed legal advice on a decision that he was to make, he would be in the "control group" for purposes of that decision. Petitioners therefore err in characterizing (Br. 12; footnote omitted) the decision of the court of appeals as holding that the " 'client' consists only of the corporation's controlling group of central managers." To the contrary, the control group test protects communications made by "those officers, *usually* top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given" (Pet. App. 5a; emphasis supplied).

The court of appeals' control group test is therefore not as inflexible as petitioners would have it. Any employee of a corporation who needs legal advice for a decision he makes or has a substantial role in making would be covered by the privilege under the control group test. Far from ignoring the realities of corporate life, the control group test deals with those realities in a practical manner by assessing the authority and the responsibilities of the employees communicating with corporate counsel in a given case. Those who are seeking legal advice on behalf of the corporation fall within the privilege. On the other hand, those employees who, like bystander witnesses, merely provide facts on which legal advice to other employees or officers will be based are not within the absolute privilege. See D. McCormick, *supra*, § 87.

E. The Subject Matter Test Is Unrelated To The Policies Underlying The Attorney-Client Privilege And Encourages Abuse

In marked contrast to the control group test applied by the courts below, the subject matter test urged by petitioners would encompass all communications made by a corporation's employees to corporate counsel where the communication is made at the direction of the employee's superiors and the subject of the communication upon which the attorney's advice is sought is the performance by the employee of the duties of his employment. See *Harper & Row Publishers, Inc.* v. *Decker*, *supra*, 423 F.2d at 491–492. Subsequent to *Harper & Row*, the Eighth Circuit adopted the subject matter test in *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (1977), adding the requirement that the employee's superior must have requested the employee to communicate with the lawyer so that the corporation could obtain legal advice. Accord: 2 J. Weinstein & M. Berger, *Evidence* ¶ 503(b)[04](1979).

A large corporation's employees regularly generate a great deal of information that is transmitted to their superiors and, in some instances, to the corporation's attorneys. Gathering of such information is an essential aspect of the conduct of the corporation's business. Under the broad subject matter test, corporate management would be allowed to use counsel to create a channel of

privileged communications to collect information about the activities of lower-level employees which they would collect regardless of the privilege. Since the policy justification for the privilege is to encourage communications with counsel that would otherwise not be made, the subject matter test fails to reflect the purposes of the privilege.[25]

Indeed, the subject matter test would encourage corporations to create a broad "zone of silence" around any information that has potential legal consequences by funneling such information through house counsel. Thus, for example, a former SEC Commissioner recently recommended at a professional conference that any internal in-

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[25] Contrary to the argument of the amicus American Bar Association (Br. 4–9), the question as to the scope of the attorney-client privilege cannot be resolved by protecting the communications of any corporate employee to counsel on the formalistic basis that he is an agent of the corporation. To be sure, a client's freedom of communication requires that he be permitted to engage a person to communicate with his attorney, if circumstances so dictate. On the other hand, the privilege does not protect the disclosures of third parties, even though the lawyer may communicate with those parties at the instance of the client. See 8 J. Wigmore, *supra*, § 2317(2).

If a corporation were permitted to designate any of its employees as its agent and thereby claim protection for communications, the corporate privilege would be far broader than that of an individual. The question is therefore whether all corporate employees are deemed to be the "client" on the basis of their agent status or whether some might be so far removed from the decision-making level as to be essentially third parties vis-a-vis the corporation. As one commentator has observed, "The problem cannot be solved by a simple reference to the law of agency, for it is not enough that the spokesman is a corporate agent; the question is whether the good that the privilege seeks to accomplish—candor between client and attorney—would be defeated unless the particular agent were permitted to speak for the corporation" Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953, 956 (1956). Here as we have pointed out (pages 26–28, *supra*), the policy of the privilege would not be served by extending it to the employee communications at issue because the employees would have made their disclosures even in the absence of the privilege. Indeed, if the question turned on the formalities of the law of agency, the employees' statements in *Hickman* v. *Taylor*, *supra*, would have been protected by the attorney-client privilege, a claim that the Court explicitly rejected (329 U.S. at 508).

vestigation conducted by a corporation into possible wrongdoing should be undertaken by outside counsel and "at all events, it should not be undertaken by non-lawyers." Wheat, *The Attorney-Client Privilege and the Attorney's Work Product Rule—Some Issues for the Corporate Lawyer*, Vol. 3 Course Materials, University of California, San Diego, 7th Annual Securities Regulation Institute 18 (Jan. 1980).[26] Such manipulation of the

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[26] The pertinent part of Mr. Wheat's "Some Practical Hints" reads as follows (Wheat, *supra*, at 18–19; emphasis in original):

> A. It is highly desirable that any investigation into possible corporate wrongdoing be undertaken by the corporation *before* the SEC or any other agency gets into the act.
>
> B. It is preferable for the investigation to be undertaken by outside counsel; at all events, it should not be undertaken by non-lawyers.
>
> C. Should you undertake an investigation, it is advisable to enter into an engagement letter which specifies, among other things:
>
> 1. that you are to investigate for the purpose of rendering legal advice,
>
> 2. that your engagement is in preparation for possible tax, SEC criminal class and/or derivative actions against the corporation, should the results of your inquiry show that the law was violated,
>
> 3. that you expect to prepare a report addressed to the board (or a committee of the board) which will contain your legal advice and will not be disseminated beyond the board, certain designated officers and the inside general counsel, unless you are instructed differently by the board.
>
> D. A senior officer of the corporation should instruct in writing employees you wish to interview to cooperate fully with you in furnishing information you may request relating to his activities as an employee of the corporation.
>
> E. All documents prepared in the course of the investigation should *in fact* be held confidential and, where appropriate, marked to show their confidential and privileged nature.
>
> F. If any documents are voluntarily given to the SEC, it should be pursuant to formal order of investigation and a relevant subpoena.
>
> G. If accountants and other non-lawyers are to be engaged to assist in the investigation, they should be engaged by, and report *only* to, the lawyers in charge of the investigation.
>
> * * * * *

attorney-client privilege and the use of corporate executives (such as Thomas) who happen to be lawyers to perform what are essentially non-legal fact gathering tasks would undermine the legitimate right of law enforcement agencies "to satisfy themselves that corporate behavior is consistent with the law and the public interest." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). See also *United States* v. *White*, 322 U.S. 694, 700 (1944). As a noted commentator foresaw long before the current conflict between the control group and subject matter tests reached the courts, "Where corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large." Simon, *The Attorney-Client Privilege As Applied to Corporations*, 65 Yale L.J. 953, 955 (1956). The author expressed the belief, which is consistent with our submission, that "Few judges * * * would long tolerate any common law privilege that allowed corporations to insulate all their activities by discussing them with legal advisers." Simon, *supra*, at 955–956.[27]

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[27] To be sure, the modification to the subject matter test adopted by the Eighth Circuit in *Diversified Industries* would limit the opportunity for wholesale manipulation of the privilege by requiring that the employee's superior must have requested the employee to communicate with the lawyer so that the corporation could secure legal advice. Under this modified subject matter test, a corporation would be unable to shield all potentially sensitive information by funneling it through its counsel. However, in a particular instance, it would be relatively easy, as in the instant case, for management to direct an employee to communicate with counsel so that the corporation could obtain legal advice. Such an arrangement would not be unusual, for as petitioners acknowledge (Br. 19–20), legal advice is relevant in almost every activity of modern corporate enterprise.

At all events, it is significant that petitioner (Br. 21–23), and the amici American Bar Association (Br. 6) and the American College of Trial Lawyers (Br. 10 n.5) reject the modified subject matter test. Petitioners argue (Br. 23) that "It should suffice if a corporation's attorney-client privilege were understood to encompass all communications made in confidence by corporate employees to corporate counsel regarding matters within their knowledge as employees and relevant to advice sought by the corporation from counsel." Thus, the broad subject matter test urged by petitioners would result in the very abuses that even the formulation in *Diversified Industries* sought to avoid.

Finally, it is no answer to argue, as do petitioners (Br. 29), that a litigant may always obtain the testimony of each individual employee. The argument might have some merit in a case in which the corporation is small. But in a corporation of the size of Upjohn, the argument stands reality on its head. Here, there were some 53 questionnaires and 86 interviews. There could conceivably have been hundreds or thousands. It is for this reason that corporate officers and directors have the fiduciary duty to apprise themselves of the activities of their subordinates and that Rule 33, Fed. R. Civ. P., provides that an officer or agent shall be designated to provide all the information known to a corporation. Yet petitioners seek to undermine these policies by using corporate counsel to investigate wrongdoing and then claiming protection for their findings under the absolute attorney-client privilege. If corporate officers can fulfill their fiduciary duties without apprising themselves of unpleasant facts that they, as opposed to their counsel, may have to disclose, then counsel will indeed become the exclusive repository of such unpleasant facts. Indeed, Upjohn's denial (Br. 28) that this is the consequence of its argument is belied by its acknowledgment (Br. 19) that such facts are not realistically available from any central source other than counsel. The Court should therefore reject the overly broad subject matter test and adopt the control group test as more responsive to the policies of the attorney-client privilege and to the responsibilities of corporations to the public.

F. State Law Does Not Favor The Subject Matter Test

Contrary to petitioners' argument (Br. 24–27), the subject matter test is not supported by "[t]he overwhelming majority of state courts." That assertion seriously mischaracterizes the import of the state authorities. To begin with, as we have pointed out (page 13, note 8, *supra*), six states (Arkansas, Maine, Nevada, North Dakota, Oklahoma, and South Dakota) have adopted the control group test by statute. Petitioners therefore err in including Nevada and South Dakota in their list of states

(Br. 26 n.30) favoring a broad test in defining the attorney-client privilege for corporations.[28]

Moreover, although petitioners concede (Br. 26 n.30) that the Appellate Court of Illinois applied the control group test in *Day* v. *Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964), they claim that the authority of that case has been undermined by the Illinois Supreme Court's decision in *Cox* v. *Yellow Cab Co.*, 61 Ill. 2d 416, 337 N.E.2d 15 (1975). In petitioners' view, the *Cox* opinion's citation of *D.I. Chadbourne, Inc.* v. *Superior Court*, 60 Cal. 2d 723, 388 P.2d 700 (1964)—a California Supreme Court decision upholding the subject matter test—demonstrates a shift in the Illinois decisional law in favor of the subject matter test.

But an examination of *Cox* reveals that the court simply cited *D.I. Chadbourne, Inc.* for the undisputed proposition that the claimant to the privilege must prove the facts that give rise to the privilege (see 61 Ill. 2d at 420; 337 N.E.2d at 18). In *Cox*, the court held that the claimant had not established a factual basis for the applicability of the privilege. In the absence of any evidence that the communications were made in the context of an attorney-client relationship, the fact that they found their way into the files of an attorney was deemed irrelevant. Hence, *Cox* in no way vitiates the authority of *Day* v. *Illinois Power Co.*, *supra*, or the applicability of the control group test in Illinois. See *Johnson* v. *Frontier Ford, Inc.*, 68 Ill. App. 3d 315, 319 (1979).[29]

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[28] See Nev. Rev. Stat. § 49.075 (1979) ("'Representative of the client' means a person having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client"); S.D. Codified Laws Ann. § 19-13-2, Rules of Evidence (rev. 1979) ("A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client").

[29] The remaining decisions cited by petitioners (Br. 26 n.30) do not support their assertion that 13 additional states favor a broad attorney-client privilege for corporations. None of those cases addresses the question presented as to the propriety of the control group test as furthering the policies of the attorney-client privilege. Although some of them contain dicta favoring a privilege encompassing communications between "agents" of the corporation and counsel, their analyses for the most part blur the distinction between the absolute attorney-client privilege and the qualified work product privilege.

In sum, the decisions of the state courts offer little, if any, guidance for resolution of the question in this case. As the foregoing discussion indicates, to the extent that state law has addressed the question presented, seven states have adopted the control group test, and only one state, California, has adopted the subject matter test. Contrary to petitioners' overstatement (Br. 25), there has not been an "overwhelming" adoption of the subject matter test by the state courts to which this Court should give deference.[30]

Nor do the lower court opinions in *Ford Motor Co.* v. *O.W. Burke Co.*, 299 N.Y.S.2d 946 (Sup. Ct. 1969), or *Stewart Equipment Co.* v. *Gallo*, 32 N.J. Super. 15, 107 A.2d 527 (Law Div. 1954), which petitioners cite (Br. 25), indicate that New York or New Jersey have "adopted" the subject matter test. The former case held that the privilege applied to a plant employee's report to in-house counsel in anticipation of litigation. However, the case turns entirely upon whether the privilege applies to in-house as well as independent counsel. The court's opinion in no way addresses the status of the employee. At all events, it would appear that the report would be covered by the qualified work product doctrine.

Stewart Equipment Co. v. *Gallo*, *supra*, is likewise distinguishable. There, the communication to counsel by a corporate official serving as vice-president and sales manager was held to be within the attorney-client privilege. While the court held that the official in question could not waive the privilege on behalf of the corporation because he was not a director, such an officer could well be viewed as a member of the control group. Since neither *Ford Motor Co.* nor *Stewart Equipment Co.* addressed the relative merits of the control group and subject matter tests, there is no basis for petitioners' claim (Br. 25) that "[t]he decision in *D.I. Chadbourne* reflects the virtually unanimous view of those states that have considered the question."

[30] Contrary to petitioners' further argument (Br. 27 n.31), a federal rule adopting the control group test would not displace the state rules of evidentiary privileges. Under Rule 501 of the Federal Rules of Evidence, federal courts will apply a federal rule of privilege only in federal question cases. Rule 501 further provides that the federal courts will apply the state rule in diversity jurisdiction cases.

II

THE WORK PRODUCT DOCTRINE OF *HICKMAN* V. *TAYLOR*, 329 U.S. 495 (1947), DOES NOT PROTECT THE DOCUMENTARY EVIDENCE SOUGHT BY THE INTERNAL REVENUE SERVICE SUMMONS FROM COMPELLED DISCLOSURE BECAUSE THE GOVERNMENT SHOWED AMPLE NECESSITY FOR THE PRODUCTION OF SUCH EVIDENCE

1. As we have pointed out (pages 32–35, *supra*), the Court in *Hickman* v. *Taylor*, 329 U.S. 495 (1947), recognized a qualified privilege for certain materials prepared by an attorney "acting for his client in anticipation of litigation" (*id.* at 508). There, with an eye to potential litigation arising out of a tugboat accident, the defendant's counsel had personally secured written and oral statements from witnesses in preparation for possible trial. The plaintiffs' counsel, in order to prepare for his own examination of these witnesses, sought to discover copies of the signed written statements and the defendant's attorney's detailed resumes of the oral statements. The Court, characterizing these materials as the "work product" of the lawyer, indicated that without a showing of special need, they were privileged from discovery. As the Court stated, "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. * * * And production might be justified where the witnesses are no longer available or may be reached only with difficulty" (*id.* at 511).[31]

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[31] As we have pointed out (pages 32–34, *supra*), the work product doctrine is a qualified privilege that is distinct from the absolute protection afforded by the attorney-client privilege. See *United States* v. *Nobles*, 422 U.S. 225, 238 n.11 (1975). Since *Hickman*, Congress, the courts and the commentators have uniformly viewed the work product doctrine solely as a limitation on pretrial discovery and not as a qualified evidentiary privilege. Thus, Fed. R. Civ. P. 26(b) incorporates much of what the Court held in *Hickman* with respect to pretrial discovery.

In the instant case, the district court observed that "[t]here is, at the outset, a serious question as to whether the work product doctrine is even applicable in a summons enforcement proceeding" (Pet. App. 26a; J.A. 188a). See *United States* v. *McKay*, 372 F.2d 174 (5th Cir. 1967). Contra: *United States* v. *Brown*, 478 F.2d 1038 (7th Cir. 1973); *United States* v. *Amerada Hess Corp.*, 619 F.2d 980, 987–988 (3d Cir. 1980). But even if the work product doctrine is applicable to summons enforcement proceedings, the district court found that the government had shown ample necessity for compelling disclosure (see Pet. App. 28a–30a; J.A. 190a–192a). The court of appeals also rejected petitioners' claim that the documents sought by the summons were protected by the work product doctrine. Although it left undisturbed the district court's finding that the record established ample necessity for compelling disclosure of the summoned material, the court of appeals also expressed the view that "[t]he work-product doctrine of *Hickman* v. *Taylor* * * * is not applicable to administrative summonses issued under 26 U.S.C. § 7602" (Pet. App. 7a n.13).

2. As we acknowledged in our brief (page 10) in response to the petition in this case, the courts of appeals have expressed disparate views as to whether the work product doctrine applies in a summons enforcement proceeding. See *United States* v. *Nobles*, 422 U.S. 225, 247 n.6 (1975) (White, J., concurring). Compare *United States* v. *McKay*, *supra*, 372 F.2d at 176 ("relevancy of the work product privilege enunciated in the *Hickman* case to a proceeding for the enforcement of the Commissioner's summons may well be doubted") with *United States* v. *Brown*, *supra*, 478 F.2d at 1041 ("work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue summons").[32] Recently, the Third Circuit expressed agreement with *Brown*, although

[32] In *McKay*, the court also held that the appraisal report at issue was in no sense the work product of a lawyer (see 372 F.2d at 177). In *Brown*, the court ruled that the Commissioner had shown sufficient cause to rebut the taxpayer's work product claim on the ground that the document—an attorney's memorandum—was "necessary for a correct determination of the taxpayer's liabilities and that the information contained therein could not be obtained from any other source" (478 F.2d at 1041; see also *id.* at 1039–1040).

it enforced the summons on the ground that the government had made the requisite showing of necessity because the work product in question was of minimal substantive content. *United States* v. *Amerada Hess Corp.*, *supra*, 619 F.2d at 987–988.[33]

3. We do not quarrel with petitioners' submission that, as a matter of law, the work product doctrine is applicable to IRS summons enforcement proceedings. Apart from the decision below, the sole appellate authority to the contrary, *United States* v. *McKay*, *supra*, 372 F.2d at 176, relied upon the analogy of the Commissioner's summons authority to the inquisitorial power of the grand jury. See *United States* v. *Powell*, 379 U.S. 48, 57 (1964); *United States* v. *Bisceglia*, 420 U.S. 141, 147–148 (1975). But the courts of appeals have thus far uniformly held that the work product rule is applicable to a grand jury subpoena.[34] Since there appear to be no unique characteristics or special policies inherent in summons enforcement cases that would foreclose similar application of the work product doctrine in that context, we agree that the *Hickman* rationale and Rule 26(b), Fed. R. Civ. P., can be invoked to resist production of an attorney's work product pursuant to an internal revenue summons.

This is not to say, however, that petitioners' work product claim should defeat enforcement of the summons at issue here. We submit that the district court properly found that "the record establishes ample necessity for compelling disclosure of the summoned material in this case" (Pet. App. 30a; J.A. 192a). Indeed, Upjohn's conduct

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[33] In *In re Grand Jury Investigation* (*Sun Co.*), *supra*, the Third Circuit held that materials similar to those involved here sought by a grand jury subpoena were protected by the work product doctrine, and that the government had demonstrated good cause to overcome that protection with respect to questionnaires and interview memoranda generated by a deceased employee of the corporation because of the government's inability to secure the information from any more reliable source. However, the court deferred ordering production of all of the other materials sought until the government had subpoenaed witnesses before the grand jury (see 599 F.2d at 1228–1233).

[34] See *In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc.*, 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Investigation* (*Sun Co.*), 599 F.2d 1224 (3d Cir. 1979); *In re Grand Jury Proceedings* (*Duffy*), 473 F.2d 840 (8th Cir. 1973).

during the audit and its refusal to permit independent corroboration of its assertions concerning the tax consequences of its questionable payments constitute an almost classic case of "ample necessity" and "special need" sufficient to rebut a work product claim under *Hickman* v. *Taylor*, *supra*. Here, petitioners have conceded that there are approximately $3 million of questionable payments that are inaccurately reflected on the corporate books. They nevertheless contend that these payments are not relevant to its federal tax liability, and have refused to permit corporate employees to be questioned by the IRS about these payments. The Commissioner understandably wishes to exercise his own independent judgment in making that determination. All the government is seeking here is the factual data—set forth on the employees' questionnaires and the notes of their interviews—necessary to make that independent judgment that is at the heart of effective enforcement of the tax laws.

Production of such evidence is firmly grounded in the strong public policy favoring enforcement of Internal Revenue summonses. See *United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975). Given this policy and the relevance and importance of the employee questionnaire and interview notes, the government has here shown sufficient need for the evidence and its virtual unavailability from any other source. Some of the employees are no longer with the Company (J.A. 114a–118a). Most of the remaining employees are located throughout the world, some in countries where the government representatives would not have easy access. While Upjohn has offered to transport these employees to a neutral country (J.A. 121a), it has forbidden its employees to discuss with the IRS any payments that Upjohn has concluded are irrelevant[35] (Pet.

[35] With regard to these payments, petitioners are effectively requiring the Commissioner to show probable cause why their records should be made available in spite of this Court's holding in *United States* v. *Powell*, 379 U.S. 48, 57 (1964), that no such showing is necessary for the enforcement of an IRS summons. Furthermore, contrary to petitioners' suggestion (Br. 61), the IRS cannot determine whether the payments in question are covered by Rev. Rul. 77–442, 1977–2 Cum. Bull. 264, until it knows the nature of the payment, as well as for whose benefit the payment was made. Clearly, the IRS need not accept petitioners' characterization of such payments (see pages 23–25, note 15, *supra*).

App. 16a; J.A. 178a). Since the interviews are to be conducted according to ground rules established by Upjohn and Upjohn refuses to allow its employees to discuss certain information, it is clear that absent production of the questionnaires and interviews the information is, as a practical matter, unavailable to the IRS.[36] Furthermore, many of the employees are foreign nationals (J.A. 79a, 125a) who may not be subject to the process of the federal courts. See *Wilson* v. *David*, 21 F.R.D. 217, 221–222 (W.D. Mich. 1957). There is accordingly no basis for petitioner's assertion (Br. 62–63) that the information is available by direct examination of the employees.

Finally, it should be emphasized that approximately three years have elapsed since the questionnaires at issue were sent out and the final Form 8-K was filed. Memories grow cold with the passage of time. It is therefore likely that the employees have forgotten some of the details of the myriad transactions they reported. The questionnaires and interview notes—taken at times more contemporaneous with the years under audit—are a far more accurate source for determining Upjohn's correct tax liability than the employees' present recollection, assuming that they can be located and questioned. Indeed, it is not unrealistic to assume that Upjohn's employees might be less cooperative in responding to direct examination by an internal revenue agent than to a request from a company superior.[37] See *Southern Ry.* v. *Lanham*, 403 F.2d 119, 127–129 (5th Cir. 1968); *Goosman* v. *A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963).

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[36] The case is therefore distinguishable from: (1) *In re Grand Jury Investigation (Sun Co.)*, *supra*, 599 F.2d at 1232, where the government made no effort to secure the testimony of the interviewees, and their unavailability was purely conjectural; (2) *Diversified Industries, Inc.* v. *Meredith*, *supra*, 572 F.2d at 611, where the employees themselves were apparently fully available; and (3) *In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc.*, *supra*, 599 F.2d at 512, where the employees were to be called to testify before the grand jury and the government was only trying to determine beforehand to whom it should grant immunity.

[37] Counsel for petitioner Thomas stated at the hearing that whether Upjohn's employees will testify will depend on the laws of their own countries. He also stated that he was not even sure some of them would testify and that Upjohn would not compel them to do so (J.A. 78a–79a).

Accordingly, the judgment of the court of appeals can be affirmed on the basis of the district court's finding that "the record establishes ample necessity for compelling disclosure of the summoned material in this case" (Pet. App. 30a; J.A. 192a). As the Court stated in *Hickman* v. *Taylor*, *supra*, 329 U.S. at 511–512, in terms that are particularly appropriate in describing the obstacles that the IRS would otherwise face in pursuing its investigation of Upjohn, "production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning." Petitioners' work product claim should therefore be rejected and the summons enforced.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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